

SERVICE DATE: MAY 30, 1997 - LATE RELEASE

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
--CONTROL AND OPERATING LEASES/AGREEMENTS--
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

Decision No. 7

Decided: May 29, 1997

On April 10, 1997, CSX Corporation (CSXC), CSX Transportation, Inc. (CSXT), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRI), and Consolidated Rail Corporation (CRC) filed their CSX/NS-1 notice of intent to file an application (the primary application) seeking Surface Transportation Board (Board) authorization for: (1) the acquisition of control by CSXC and NSC of CRI, which is to be jointly owned by CSXC and NSC by and through a special purpose limited liability company (LLC) and LLC's wholly owned subsidiary, Green Acquisition Corporation (Tender Sub); and (2) as soon as practicable after the authorization and exercise of such control, the division of Conrail's assets by and between, and for the benefit of, CSX and NS.¹

Prior Decisions. In Decision No. 1 (served April 16, 1997), in order to facilitate the prompt and efficient resolution of this proceeding, the parties to this proceeding were directed to comply with the protective order attached to that decision as Appendix A, and, in addition, this proceeding was assigned to Administrative Law Judge Jacob Leventhal for handling of all discovery matters and the initial resolution of all discovery disputes.

¹ CSXC and CSXT, and their wholly owned subsidiaries, are referred to collectively as CSX. NSC and NSR, and their wholly owned subsidiaries, are referred to collectively as NS. CRI and CRC, and their wholly owned subsidiaries, are referred to collectively as Conrail. CSX, NS, and Conrail are referred to collectively as applicants.

The acquisition of control by CSXC and NSC of CRI is referred to as the Control Transaction. Certain interrelated aspects of the Control Transaction, more fully described below, are referred to as the Transaction Elements. The division of Conrail's assets between CSX and NS is referred to as the Division.

The primary application, which applicants now expect to file in mid-June 1997, *see* CSX/NS-10 at 7, will seek authorization under 49 U.S.C. 11323-25 for the Control Transaction and the Transaction Elements. A separate authorization will not be sought for the Division; what applicants call the Division amounts to a general description of the interrelated aspects of the Control Transaction that applicants refer to as the Transaction Elements. See also the schedule attached to CSX/NS-1 (it provides a general description of the major divisions and assignments of assets and rights agreed upon by CSXC and NSC).

Applicants also intend to file, in addition to the primary application, a number of directly related but separate applications, petitions, and/or notices to authorize abandonments and construction activities that applicants anticipate will take place if the primary application is approved. Applicants will also file an application or petition to authorize control by CSXC of The Lakefront Dock and Railroad Terminal Company (LD&RT), a terminal railroad in which CSXT and CRC each hold a 50% interest.

In Decision No. 2 (served April 21, 1997, and published that day in the *Federal Register* at 62 FR 19390), we found that the transaction contemplated by applicants is a major transaction, as that term is defined at 49 CFR 1180.2(a); we waived the 3-month prefiling notification requirement of 49 CFR 1180.4(b)(1); and we invited comments from interested persons on a proposed procedural schedule.

In Decision No. 3 (served April 22, 1997), Judge Leventhal announced that, on May 7, 1997, oral argument would be heard on a discovery motion filed in this proceeding.

In Decision No. 4 (served May 2, 1997), we reaffirmed our waiver of the 49 CFR 1180.4(b)(1) 3-month prefiling notification requirement; we reaffirmed the propriety of the previously adopted protective order; but, acting out of an abundance of caution, we modified that protective order to restrict, to outside counsel and outside consultants, exchanges of competitively sensitive information between CSX and NS.

In Decision No. 5 (served May 13, 1997, and published that day in the *Federal Register* at 62 FR 26352), we invited comments from interested persons respecting the CSX-1 and NS-1 petitions filed May 2, 1997, by applicants, wherein applicants seek, for seven construction projects, a waiver of the otherwise applicable “everything goes together” rule of 49 CFR 1180.4(c)(2)(vi).

In Decision No. 6 (served May 30, 1997, and published in the *Federal Register* on May 30, 1997, at 62 FR 29387), we adopted a procedural schedule to govern the course of this proceeding.

This Decision. We address, in this decision, the CSX/NS-10 petition, filed May 2, 1997, by applicants, wherein applicants seek waiver or clarification of certain requirements of the Board's Railroad Consolidation Procedures at 49 CFR part 1180, in connection with the Control Transaction and the Transaction Elements. Applicants also seek waiver or clarification to permit them to seek Board approval of the Control Transaction and the Transaction Elements in a single primary application. Applicants additionally seek exemption from certain requirements otherwise applicable to directly related constructions and abandonments.²

BACKGROUND

The Control Transaction. CSXC and NSC will participate jointly in the acquisition of control of CRI consistent with the Agreement and Plan of Merger dated as of October 14, 1996, between CSXC, CRI, and Tender Sub, as amended (the Merger Agreement),³ and the Letter Agreement dated as of April 8, 1997, between CSXC and NSC (the CSX/NS Letter Agreement). In accordance with the CSX/NS Letter Agreement: CSXC will contribute to LLC all of the capital stock of Tender Sub, which currently holds a beneficial interest in approximately 19.9% of the common stock of CRI; and NSC will cause its wholly owned subsidiary, Atlantic Acquisition Corp., to contribute to LLC its beneficial interest in approximately 9.9% of the common stock of CRI. Following these contributions and the closing of the current pending joint tender offer of CSXC and NSC for the remaining outstanding CRI common stock,⁴ CSXC and NSC will each have a 50% voting interest in LLC and will each have the right to appoint 50% of LLC's board of managers or directors or similar governing persons. CSXC will have a 42% equity interest in LLC; NSC will have a 58% equity interest in LLC.

² Applicants seek waiver or clarification pursuant to 49 CFR 1110.9, 1180.4(f), and 1152.24(e)(5).

³ The last amendment to date to the Merger Agreement is the Fourth Amendment dated as of April 8, 1997.

⁴ Both CSXC and NSC will contribute, directly or indirectly, cash to LLC to enable LLC to purchase the remaining outstanding shares of CRI.

Following the closing of the current pending joint tender offer, and assuming the success thereof, there will be a merger (the Merger) of Green Merger Corp. (Merger Sub), a wholly owned subsidiary of Tender Sub, with and into CRI, with CRI as the surviving corporation. That surviving corporation will be a wholly owned indirect subsidiary of LLC and, immediately upon the Merger, will continue to be named "Conrail Inc."⁵

The Voting Trust. Prior to such time, if ever, as the Board approves the primary application, the CRI common stock owned by Tender Sub will be held in a Joint Voting Trust. By letter dated May 8, 1997, the Board's Secretary advised applicants that, in his opinion, the Joint Voting Trust contemplated by applicants will effectively insulate CSXC and NSC, and their respective affiliates, from the violation of Subtitle IV of Title 49, United States Code, and the policy of the Board that would result if CSXC and/or NSC were to acquire, without authorization, what would otherwise be a controlling interest in CRI's carrier subsidiaries.

The Division. Applicants indicate that, if and when the Board approves the primary application, applicants will effect the Division as promptly as possible.⁶ Two wholly owned CRC subsidiaries, Sub A and Sub B (sometimes referred to collectively as the Subsidiaries),⁷ will be created, and each will acquire certain of CRC's assets. Sub A will acquire certain CRC assets designated to be operated as part of CSX's rail system, and Sub B will acquire certain CRC assets designated to be operated as part of NS's rail system. Not all CRC assets will be divided between Sub A and Sub B; certain CRC assets will continue to be held by CRI and CRC (or their other subsidiaries), although such assets will be operated for the benefit of CSX and NS. Sub A and Sub B will operate the CRC assets held by them for the benefit of CSX and NS, respectively, and CSX and NS will operate certain properties of Sub A and Sub B pursuant to long-term operating agreements, leases, and indemnity arrangements. Similarly, Conrail will enter into operating arrangements with CSX and NS pursuant to which Conrail will operate the assets held by CRI or CRC (or their subsidiaries other than Sub A and Sub B) for the shared benefit of CSX and NS.

As part of the Division, CSX and NS will acquire trackage rights on certain of the Conrail lines and will jointly use certain Conrail lines and facilities. Conrail will retain certain incidental trackage rights over certain line segments to be acquired by the Subsidiaries to facilitate its operation of such lines and facilities.

In addition, the former Conrail line now owned by NS that runs from Fort Wayne, IN, to Chicago, IL (the Fort Wayne line), will be transferred to CRC or a newly created subsidiary of CRC in a like-kind exchange for CRC's Chicago South/Illinois Lines (the Streator Line). CRC or that newly created subsidiary of CRC, as the case may be, will in turn assign the Fort Wayne line to

⁵ Applicants anticipate that, of the cash contributed by CSXC and NSC to LLC, any cash not used to purchase CRI common stock in connection with the current pending joint tender offer will be used to purchase CRI common stock in connection with the Merger.

⁶ The Division is variously described both as bipartite and as tripartite. The bipartite description, *see* CSX/NS-10 at 2, emphasizes the division of Conrail's assets into: (i) certain assets that will be assigned individually either to CSX or to NS through operating agreements or other mechanisms; and (ii) certain assets that will be shared by, and operated for the benefit of, both CSX and NS. The tripartite description, *see* CSX/NS-10 at 1-2, stresses the division of Conrail's assets into: (i) certain assets that will be the subject of separate long-term operating agreements, operating leases, or other operating arrangements with CSX and NS, respectively; (ii) certain assets that will be separately owned by CSX and NS, respectively; and (iii) certain assets that will continue to be held by CRI and CRC or their subsidiaries (other than the subsidiaries referred to as Sub A and Sub B) and operated for the benefit of CSX and NS.

⁷ Applicants anticipate that the Subsidiaries, the precise names of which have not yet been determined, will be limited liability companies, with CRC as their sole "member" (the equivalent to "stockholder" in a corporation).

Sub A, to be operated together with the other Conrail lines to be assigned to Sub A and used by CSX as part of CSX's rail system.⁸

The Transaction Elements. As described by applicants, the Transaction Elements (i.e., the interrelated aspects of the Control Transaction) embrace seven categories of authorizations:

(1) *The Sub A/Sub B Acquisitions:* Authorization under 49 U.S.C. 11323 for Sub A to acquire certain assets of Conrail designated to be operated as part of CSX's rail system, and for Sub B to acquire certain assets of Conrail designated to be operated as part of NS's rail system. The assets to be acquired by Sub A and Sub B will include, among other things, trackage rights and other rights.

(2) *The Continuance in Control:* Authorization under 49 U.S.C. 11323 for CSX, NS, and Conrail to continue to control Sub A and Sub B, subsequent to Sub A and Sub B acquiring the assets of Conrail identified in the preceding paragraph, and thereby becoming rail carriers. Applicants note that this authorization will be necessary because, although Sub A and Sub B will continue after the Division to be wholly owned subsidiaries of CRC and thus under the control of CSX, NS, and CRI, they will no longer be part of a Conrail "single system" of rail carriers to the extent their operations are conducted under the operating arrangements referred to in the following paragraph for the respective separate accounts of CSX and NS.

(3) *The Operating Arrangements:* Authorization under 49 U.S.C. 11323: (a) for Sub A to enter into operating arrangements with CSX for the operation of the Conrail assets held by Sub A for the benefit of CSX; (b) for Sub B to enter into operating arrangements with NS for the operation of the Conrail assets held by Sub B for the benefit of NS; and (c) for CRI, CRC, or one or more of their subsidiaries (other than Sub A and Sub B) to enter into operating arrangements with CSX and NS for the operation of assets held by CRI, CRC, or one or more of their subsidiaries (other than Sub A and Sub B), as the case may be, for the benefit of CSX or NS or both.

(4) *The CSX/NS Trackage Rights:* Authorization under 49 U.S.C. 11323 for the acquisition of trackage rights by Sub A or CSX over NS (these being trackage rights formerly held by Conrail over NS) and by Sub B or NS over CSX (these being trackage rights formerly held by Conrail over CSX), and for the acquisition of any other trackage rights by Sub A or by CSX over Sub B or by Sub B or NS over Sub A.

(5) *The Joint Use:* Authorization under 49 U.S.C. 11323 for the acquisition by CSX and NS of trackage rights over certain Conrail rail lines (and the retention of certain incidental trackage rights by Conrail over certain line segments to be acquired by the Subsidiaries) and for the joint use of certain Conrail rail lines, rights, and facilities.

(6) *The Pooling:* Authorization under 49 U.S.C. 11322, to the extent that any of the activities of CRI, CRC, the Subsidiaries, or other subsidiaries of CRI or CRC, or the performance by CSX or NS of any contracts of Conrail entered into prior to the effective date on which the Board shall have authorized the control of Conrail by CSX and NS (the Control Date), might be deemed to be a pooling or division by CSX and NS of traffic or services or any part of their earnings.

⁸ Applicants contend that all of the proposed actions and agreements described above are integral elements of the Control Transaction and the Division. However, as we noted in Decision No. 4 (served May 2, 1997, the same day that applicants filed their CSX/NS-10 pleading), the transfer of the Fort Wayne line from NSR to CRC is neither integral to nor an inseparable part of the Control Transaction, and, for this reason, the transfer of the Fort Wayne line will be considered not in the STB Finance Docket No. 33388 lead docket but rather in a separate ("directly related") sub-docket. See Decision No. 4, slip op. at 6-7.

(7) *The Like-Kind Exchange*: authorization under 49 U.S.C. 11323 for the transfer of the Fort Wayne line from NS to Conrail and the transfer of the Streator line from Conrail to NS.⁹

DISCUSSION AND CONCLUSIONS

DEFINITION OF "APPLICANT." The Railroad Consolidation Procedures define "applicant" as one of "[t]he parties initiating a transaction." 49 CFR 1180.3(a). Applicants seek waiver or clarification that, with respect to the Control Transaction and the Transaction Elements, the term "applicant" includes only CSXC, CSXT, NSC, NSR, CRI, and CRC, and does not include LLC, Tender Sub, Merger Sub, Sub A, or Sub B, or any other subsidiary of CRC created or used for the purpose of providing services to CSX and/or NS. CSX/NS-10 at 12-14 and 34. We agree that there is no need for LLC, Tender Sub, Merger Sub, Sub A, or Sub B, or any other subsidiary of CRC created or used for the purpose of providing services to CSX and/or NS, to be a formal applicant. These entities currently have no rail activities or operations, nor will any of such entities have any such activities or operations prior to such time, if ever, as we approve the primary application; rather, these entities have been, or will be, created simply to effectuate the Control Transaction and the Transaction Elements. We will therefore grant the waiver or clarification sought by applicants.¹⁰

DEFINITION OF "APPLICANT CARRIERS." The Railroad Consolidation Procedures define "applicant carriers" as the "[a]pplicant, *all carriers related to the applicant*, and all other carriers involved in the transaction." 49 CFR 1180.3(b) (*italics in original*). Applicants seek waiver or clarification, with respect to the Control Transaction and the Transaction Elements, to limit the definition of "applicant carriers" to CSXT, NSR, and CRC, and any other Board-regulated rail carriers in which either CSXC, NSC, or CRI now holds, directly or indirectly, a majority interest (i.e., an interest greater than 50%). CSX/NS-10 at 14-16 and 34. The requested waiver or clarification would exclude from the definition of "applicant carriers": any rail carrier subsidiary not subject to our jurisdiction;¹¹ any rail carrier subsidiary subject to our jurisdiction but

⁹ We agree that the transfer of the Streator line from Conrail to NS should be considered in the lead docket. *See* Decision No. 4, slip op. at 7 n.16. As previously noted, however, the transfer of the Fort Wayne line will be considered in a separate sub-docket. In our view, the transfer of the Streator line is a Transaction Element, but the transfer of the Fort Wayne line is not a Transaction Element.

¹⁰ Similar relief has been granted in prior cases. *See Norfolk Southern Corporation and Norfolk Southern Railway Company--Control--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33286, Decision No. 5 (STB served Feb. 21, 1997) (*NS/CRC No. 5*, slip op. at 4); *CSX Corporation and CSX Transportation, Inc.--Control and Merger--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33220, Decision No. 7 (STB served Jan. 24, 1997) (*CSX/CRC No. 7*, slip op. at 3); *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760, Decision No. 3 (ICC served Sept. 5, 1995) (*UP/SP No. 3*, slip op. at 1-2); *Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company--Control--Chicago and North Western Holdings Corp. and Chicago and North Western Transportation Company*, Finance Docket No. 32133, Decision No. 3 (ICC served Oct. 26, 1992) (*UP/CNW No. 3*, slip op. at 1-2).

¹¹ Applicants indicate that this exclusion has reference to rail carrier subsidiaries located entirely in foreign countries.

in which neither CSXC, nor NSC, nor CRI now holds, directly or indirectly, a majority interest;¹² and any carrier subsidiary that is not a rail carrier.¹³

We will grant the waiver or clarification sought by applicants, by confirming that, with respect to the Control Transaction and the Transaction Elements, the term "applicant carriers" refers to CSXT, NSR, and CRC, and any other Board-regulated rail carrier in which CSXC, NSC, or CRI, respectively, now holds, directly or indirectly, a majority interest. We agree with applicants that the burdens of including financial and other data with respect to carriers other than those described in the preceding sentence would be unjustified because these data would not contribute to our evaluation of the primary application. We have no need for these data with respect to rail carrier subsidiaries not subject to our jurisdiction.¹⁴ We similarly have no need for these data with respect to rail carrier subsidiaries in which neither CSXC, nor NSC, nor CRI has (directly or indirectly) a majority interest.¹⁵ Furthermore, we have no need for these data with respect to carrier subsidiaries other than rail carriers because under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), regulatory approval is no longer required for common control of rail carriers together with motor and water carriers.¹⁶

We expect, however, that all such excluded carriers will be identified either in the corporate chart required by 49 CFR 1180.6(b)(6) or in the statement of direct or indirect intercorporate or financial relationships required by 49 CFR 1180.6(b)(8). We also expect that applicants will fully describe, in the primary application, the effects, if any, of the Control Transaction and the

¹² Applicants indicate that this exclusion has reference to a number of terminal, switching, or shortline railroads which are operated and managed independently of CSXT, NSR, and CRC, and which maintain their own records.

¹³ Applicants indicate that this exclusion has reference to: American Commercial Barge Line Company (ACBL), CSX Intermodal, Inc. (CSX Intermodal), Customized Transportation, Inc. (Customized Transportation), Sea-Land Service, Inc. (Sea-Land), Conrail Direct, Inc. (Conrail Direct), North American Van Lines (NAVL), and Triple Crown Services Company (Triple Crown). ACBL, an indirect wholly owned CSXC subsidiary, is a water carrier. CSX Intermodal and Customized Transportation, both indirect wholly owned CSXC subsidiaries, have motor carrier authority. Sea Land, a direct wholly owned CSXC subsidiary, is an ocean carrier subject to the authority of the Federal Maritime Commission. Conrail Direct, an indirect wholly owned CRI (but not CRC) subsidiary, is a motor carrier with broker authority; its applications for freight forwarder and motor contract carrier authority are pending before the Federal Highway Administration. NAVL, a direct NSC subsidiary, is a motor carrier. Triple Crown, which is owned indirectly by NSC (a 50% interest) and CRI (also a 50% interest), is an intermodal carrier that also holds motor carrier authority.

¹⁴ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 5; *CSX/CRC No. 7*, slip op. at 4.

¹⁵ Similar relief with respect to rail carrier subsidiaries in which no applicant carrier had a majority interest has been granted in prior cases, even with respect to those subsidiaries in which the applicant carriers together held a combined interest greater than 50%. *See NS/CRC No. 5*, slip op. at 5 n.12; *CSX/CRC No. 7*, slip op. at 4 n.10; *UP/SP No. 3*, slip op. at 2-3; *UP/CNW No. 3*, slip op. at 2; *Burlington Northern Inc. and Burlington Northern Railroad Company--Control and Merger--Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, Decision No. 3 (ICC served Oct. 3, 1994) (*BN/SF No. 3*, slip op. at 2-3).

¹⁶ Similar relief was granted even in cases decided prior to the enactment of ICCTA, during the time when regulatory approval was required for common control of rail carriers together with motor and water carriers. *See UP/SP No. 3*, slip op. at 3-4; *BN/SF No. 3*, slip op. at 3; *UP/CNW No. 3*, slip op. at 2-3. *See also NS/CRC No. 5*, slip op. at 6 n.13; *CSX/CRC No. 7*, slip op. at 5 n.11.

Transaction Elements on the operations of the excluded carriers. We further expect that applicants will file, along with the primary application, either an application for approval or a petition for exemption with respect to control by CSXC or NSC of any Board-regulated rail carrier in which CSXC or NSC, respectively, does not now hold, directly or indirectly, a majority interest but will hold such an interest if the primary application is approved and control of Conrail consummated.¹⁷

SUBMISSION OF CONSOLIDATED DATA. Applicants request clarification that, for the purposes of the Control Transaction and the Transaction Elements, information and data pertaining to CSXT, NSR, or CRC (or CSXC, NSC, or CRI) that are required by the Railroad Consolidation Procedures may be submitted on a consolidated basis. Applicants have in mind: that, with the one exception noted in the next paragraph, information and data pertaining to CSXT (or CSXC) and its majority-owned rail subsidiaries would be submitted on a consolidated basis; that information and data pertaining to NSR (or NSC) and its majority-owned rail subsidiaries would likewise be submitted on a consolidated basis; and that information and data pertaining to CRC (or CRI) and its majority-owned rail subsidiaries would similarly be submitted on a consolidated basis, except insofar as such information and data are, pursuant to the relief granted in this decision, submitted with and/or reflected in the information and data pertaining either to the CSX entities or the NS entities, as appropriate. CSX/NS-10 at 16-17 and 34. Applicants indicate that, with the one exception noted in the next paragraph, CSX, NS, and Conrail can provide consolidated information for all of their majority-owned subsidiaries. We agree that separate information regarding majority-owned subsidiaries is not necessary for our consideration and disposition of the primary application, and that use of consolidated information and data will avoid the unnecessary burden and redundancy of preparing and providing the information and data on a carrier-by-carrier basis. We will therefore permit the filing of information and data pertaining to each of the applicant carriers (including their majority-owned subsidiaries) on a consolidated basis.¹⁸

Applicants indicate that CSXT obtained authority to control The Indiana Rail Road Company (INRD), a majority-owned subsidiary, in November 1996. Applicants request that, to the extent CSX's consolidated information/data does not include information/data relating to INRD, CSXT and CSXC be permitted to provide any unconsolidated information/data that may be called for with respect to INRD in footnotes to the consolidated CSXT or CSXC information/data. This request is reasonable, and we will therefore approve it.¹⁹

CLASSIFICATION AND FORMAT OF EMPLOYEE IMPACT DATA. Our regulations at 49 CFR 1180.6(a)(2)(v) require a discussion of the "effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impact will occur, the time frame of the impact (for at least 3 years after consolidation), and whether any employee protection agreements have been reached." Because the regulations do not specify the "class or craft" to be used, applicants seek, with respect to the Control Transaction, confirmation that they may use the system of classification shown in attached Appendix A. CSX/NS-10 at 17-18. Applicants' proposal is adequate to provide the information we need, and we will therefore approve it.²⁰

¹⁷ The only such rail carrier identified in the CSX/NS-10 petition is the LD&RT, in which CSXT and CRC each hold a 50% interest.

¹⁸ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 6; *CSX/CRC No. 7*, slip op. at 5-6; *UP/SP No. 3*, slip op. at 4; *BN/SF No. 3*, slip op. at 3-4; *UP/CNW No. 3*, slip op. at 2.

¹⁹ Similar relief has been granted in a prior case. *See CSX/CRC No. 7*, slip op. at 6.

²⁰ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 6; *CSX/CRC No. 7*, slip op. at 6; *UP/SP No. 3*, slip op. at 4-5; *BN/SF No. 3*, slip op. at 4; *UP/CNW No. 3*, slip op. at 3. In past cases, however, the parties seeking relief have sought confirmation both that they might use the system of classification shown in an attached Appendix A and also that, in presenting the

(continued...)

BASE PERIOD DATA FOR LABOR-RELATED MATTERS. Although applicants intend to use the year 1995 as the base year for their 49 CFR 1180.7 impact analyses, *see* Decision No. 2, slip op. at 2, they would prefer to use periods other than the year 1995 in connection with their 49 CFR 1180.6(a)(2)(v) labor impact analyses. Applicants therefore request, with respect to the Control Transaction, waiver or clarification of 49 CFR 1180.6(a)(2)(v) and 1180.7 to permit the use of periods other than the year 1995 as a base line for setting forth the impacts on rail carrier employees. CSX/NS-10 at 9 and 22-23. To create the base line for rail carrier employees not covered by collective bargaining agreements (CBAs), applicants wish to use figures from the most recent practicable month in the first half of 1997; that, applicants note, is a more recent period for which figures are available. To create the base line for rail carrier employees covered by CBAs, applicants wish to use figures from November 1996; that, applicants argue, is the most recent period for which figures are available and for which the figures would not be affected by seasonal fluctuations.

The Allied Rail Unions (ARU)²¹ oppose the waiver or clarification sought by applicants with respect to employees covered by CBAs, and particularly with respect to employees covered by CBAs and represented by the BMW. *See* ARU-4 (filed May 20, 1997). Late autumn and early winter, ARU argues, tend to be low points in maintenance-of-way employment; maintenance-of-way employees are regularly furloughed in the late autumn and early winter months because weather conditions are bad, because the programmed work of large production gangs often ends in late autumn, and because maintenance-of-way budgets tend to run out at the end of the calendar year. Use of employment figures for November, ARU therefore insists, would understate the number of persons affected by the Control Transaction. ARU adds that, if applicants really want to use a single month for a base line, a better candidate would be July 1996.

Applicants have moved to strike ARU-4, *see* CSX/NS-14 (filed May 22, 1997), on the ground that the ARU-4 pleading is not permitted by our Railroad Consolidation Procedures. *See* 49 CFR 1180.4(f)(3) (reply to a petition for waiver generally not permitted).²² Applicants have also addressed, in their CSX/NS-14 pleading, the merits of ARU's argument. Applicants insist that the November 1996 figures provide the most accurate basis for formulating the required labor impact analysis for rail carrier employees covered by CBAs. Applicants add that, for all crafts, Conrail's employment figures for July 1996 "were essentially the same as for November 1996 (some slightly lower, some slightly higher)." CSX/NS-14 at 4. Applicants therefore contend that use of November 1996, as opposed to July 1996, as a base line for rail carrier employees covered by CBAs would not result in an understatement of the difference between employment before the proposed transaction and employment thereafter. Applicants claim that use of calendar year 1995 figures, however,

²⁰(...continued)

required data, they might use the format presented in an attached Appendix B. *See, e.g., NS/CRC No. 5*, slip op. at 6; *CSX/CRC No. 7*, slip op. at 6. Applicants in this proceeding have sought confirmation that they may use the system of classification shown in an attached Appendix A; they have not sought confirmation that they may use the format presented in an attached Appendix B (and no such appendix was attached to the CSX/NS-10 petition). We assume that the omission of an Appendix B was an inadvertent oversight, and, for this reason, we will, on our own initiative, confirm that applicants may use the format presented in the Appendix B attached to this decision. *See NS/CRC No. 5*, slip op. at 16 (the source for the Appendix B attached hereto).

²¹ American Train Dispatchers Department/BLE; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees (BMW); Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees International Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; The National Conference of Firemen & Oilers/SEIU; and Sheet Metal Workers' International Association.

²² In view of the importance of the issue raised in the late-filed ARU-4 pleading, and because acceptance of that pleading will not delay the issuance of this decision, we will grant ARU's request for leave to file that pleading, and we will deny the CSX/NS-14 motion to strike.

would not provide the most accurate projection of the impact of the transaction on Conrail's employees because such figures include the effect of seasonal furloughs and fail to reflect post-1995 changes in employment levels that were unrelated to the proposed transaction.

The waiver or clarification sought by applicants is not reasonable, neither with respect to employees covered by CBAs nor with respect to employees not so covered,²³ and we shall therefore require that applicants use the year 1995 as the base line for setting forth the impacts the Control Transaction and the Transaction Elements will have on rail carrier employees. Applicants have failed to justify that the use of employment figures for a single month is appropriate to eliminate seasonal fluctuations; as between employment figures for an entire year and employment figures for a single month, the latter are more likely, not less likely, to be distorted by seasonal (or other) fluctuations. Applicants may, if they are so inclined, supplement 1995 data with data demonstrating employment reductions in 1996 and/or 1997.²⁴

FORM 10-K'S, FORM S-14'S, AND ANNUAL REPORTS. Under our regulations at 49 CFR 1180.6(b)(1), (2), and (4), applicant carriers must submit their most recent Form 10-K and Form S-14 (now S-4) filings with the Securities and Exchange Commission (SEC) as Exhibits 6 and 7, respectively, and they must submit their two most recent annual reports as Exhibit 9. Furthermore, they are also required to submit any Form 10-K's, Form S-4's, and annual or quarterly reports to stockholders issued during the pendency of the proceeding. Applicants request, with respect to the Control Transaction, a waiver or clarification of these requirements as indicated in the next three paragraphs. CSX/NS-10 at 18-19.

1. Applicants request waiver or clarification of 49 CFR 1180.6(b)(1) to permit satisfaction of the Form 10-K requirement by the filing of the most recent Form 10-K's for CSXC, CSXT, NSC, NSR, CRI, and CRC, together with any Form 10-K's issued by these entities during the course of the proceeding. Applicants note that, although two of CSXT's majority-owned carrier subsidiaries filed Form 10-K's for 1995 and one filed a Form 10-K for 1996, none of NSR's or CRC's majority-owned carrier subsidiaries did so in 1995 or 1996; and applicants contend that no useful purpose would be served by requiring such additional reports, as data for the CSXT subsidiaries are included in the CSX consolidated data. Applicants' request is reasonable, and we will therefore grant it.²⁵

2. Applicants request waiver of the requirement in 49 CFR 1180.6(b)(2) that applicant carriers file past Form S-4's. Applicants indicate that CSXC filed a form S-4 in January 1997 in connection with its now abandoned unilateral effort to acquire control of CRI, that CRC last filed a Form S-4 in 1993, and that no other applicant carrier has filed a Form S-4 or S-14 for at least 5 years. Applicants contend that financial information relevant to this proceeding will be contained in the applicants' various Form 10-K's and annual reports, as well as in the SEC Schedule 14D-1's relating to the tender offers of CSX and NS for the stock of CRI, and in amendments to those filings. Given the circumstances, we conclude that the requested waiver will not have a significant impact on our review of the proposed transaction. We will therefore grant the requested waiver of 49 CFR 1180.6(b)(2) as respects past Form S-4's and Form S-14's. We note, however, that applicants have

²³ The cases cited by applicants, *see* CSX/NS-10 at 23 n.23, are not on point. *See* ARU-4 at 4 (discussing these cases in somewhat greater detail than provided by applicants).

²⁴ Moreover, the "rail carrier employees affected by the proposed transaction," whose interests we must consider in our decision on the primary application, *see* 49 U.S.C. 11324(b)(4), include not only the rail carrier employees of Conrail but also the rail carrier employees of CSX and NS. But we note that the CSX/NS-14 pleading says nothing about the impact of the transaction on employees of CSX and NS. We expect that applicants will include, in the primary application, evidence respecting the projected impact of the Control Transaction on rail carrier employees of all of the applicant carriers.

²⁵ Similar relief has been granted in prior cases. *See* NS/CRC No. 5, slip op. at 7; CSX/CRC No. 7, slip op. at 6-7; UP/SP No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 3-4.

not requested, and that we are not granting, a waiver of 49 CFR 1180.6(b)(2) as respects Form S-4's issued during the pendency of this proceeding.²⁶

3. Applicants request waiver of the requirement in 49 CFR 1180.6(b)(4) that the primary application include each applicant carrier's two most recent annual reports to stockholders. Applicants note: that CSXT does not issue annual reports (although certain majority-owned carrier subsidiaries of CSXT do issue annual reports); and that no NS or Conrail majority-owned carrier subsidiary other than NSR issues annual reports. Applicants request that they be allowed to submit, in lieu of the annual reports called for by 49 CFR 1180.6(b)(4): the two most recent annual reports issued by CSXC, NSC, NSR, and CRI; and any annual or quarterly reports issued by CSXC, NSC, NSR, and CRI during the duration of the proceeding. This request is reasonable, and we will therefore grant it.²⁷

CORPORATE INFORMATION AND REPORTS. The Railroad Consolidation Procedures require applicants to submit information respecting changes in control (Exhibit 8), a corporate chart (Exhibit 11), and certain information respecting intercorporate or financial relationships not disclosed elsewhere in the primary application. 49 CFR 1180.6(b)(3), (6), and (8), respectively. Applicants request, with respect to the Control Transaction, that we authorize omission or modification of the particular requirements indicated in the next three paragraphs. CSX/NS-10 at 19-21.

1. Section 1180.6(b)(3) requires applicants to list, among other things, any change in officers not indicated on the most recent Form R-1. Applicants note that CSXT, NSR, and CRC, and their subsidiaries, have a large number of officer positions that could arguably come within the scope of this requirement, and applicants contend that compiling this list would be burdensome and that the list itself would be of little or no value in this proceeding. Applicants therefore request that they be required to list only the principal 6 officers of CSXT, NSR, CRC, and their majority-owned subsidiaries. We believe that the proposed submissions will provide sufficient information, and we will therefore grant the request.²⁸

2. Section 1180.6(b)(6) requires applicants to submit a corporate chart which includes, for each company identified in the chart, a statement indicating any directors or officers which that company has in common with any other company on the chart. Applicants seek a partial waiver or clarification of this requirement. In order to present the information on the corporate chart in a concise and intelligible manner, applicants propose to list only those officers and directors who are either: (1) common to CSXC (including majority-owned subsidiaries) and CRI (including majority-owned subsidiaries); (2) common to NSC (including majority-owned subsidiaries) and CRI (including majority-owned subsidiaries); (3) common to CSXC (including majority-owned subsidiaries) and NSC (including majority-owned subsidiaries); or (4) common to (a) either CSXC, NSC, CRI, or any of their majority-owned subsidiaries, on the one hand, and (b) any carrier outside the CSX, NS, and Conrail corporate families, on the other hand. This request appears reasonable because our primary interests concern the relationship between the transportation activities of the applicant carriers and our immediate informational needs will be met by the information applicants

²⁶ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 7; *CSX/CRC No. 7*, slip op. at 7; *UP/SP No. 3*, slip op. at 5; *BN/SF No. 3*, slip op. at 4-5; *UP/CNW No. 3*, slip op. at 4.

²⁷ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 7 (although we apparently erred in indicating in that decision that no NS majority-owned carrier subsidiary issues annual reports); *CSX/CRC No. 7*, slip op. at 7; *UP/SP No. 3*, slip op. at 6; *BN/SF No. 3*, slip op. at 4-5; *UP/CNW No. 3*, slip op. at 4.

²⁸ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 8; *CSX/CRC No. 7*, slip op. at 8; *UP/SP No. 3*, slip op. at 6; *BN/SF No. 3*, slip op. at 5; *UP/CNW No. 3*, slip op. at 4.

propose to file. We will therefore permit applicants to indicate common officers or directors as they propose.²⁹

3. Section 1180.6(b)(8) requires applicants to disclose intercorporate or financial relationships between applicant carriers or affiliated persons and other carriers or any persons affiliated with them. Applicants request waiver or clarification that this requirement pertains only to significant intercorporate or financial relationships. Applicants propose to describe only those relationships involving ownership by applicants or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with applicants owns more than 5% of a non-affiliated carrier's stock. This proposal will not impede our review of the financial and competitive impacts of the Control Transaction. Accordingly, we will grant it.³⁰

FINANCIAL INFORMATION. Our regulations require the submission of: *pro forma* balance sheets, 49 CFR 1180.9(a); *pro forma* income statements, 49 CFR 1180.9(b); and statements of sources and application of funds, 49 CFR 1180.9(c). Applicants request, with respect to the Control Transaction, waiver or clarification of these requirements to permit them to reflect Conrail financial information in the respective statements of CSX and NS, as appropriate; applicants would prefer not to file separate statements for Conrail. CSX/NS-10 at 21-22. Applicants acknowledge, of course, that Conrail and its subsidiaries will continue to exist as separate entities following the acquisition of control of Conrail by CSX and NS, but applicants maintain that the ultimate transportation and other economic effects of the Control Transaction (including gains and losses from continuing Conrail operations) will be fully reflected in the respective statements of CSX and NS. Those statements, applicants contend, will provide the most accurate reporting of the effects of the Control Transaction.

The Port Authority of New York and New Jersey (the Port Authority) contends that applicants should be required to file separate financial statements for Conrail and its subsidiaries. *See* NYNJ-3 (filed May 7, 1997). The Port Authority argues: that if, as applicants intend, Conrail is kept in place as the only carrier serving the New York/New Jersey metropolitan area (the NY/NJ Metro Area), there may be a lessened incentive to construct additional rail infrastructure in that area; that the incentives of CSX and NS to invest in Conrail rail facilities in the NY/NJ Metro Area will depend, in part, upon the profitability of Conrail and the return Conrail will provide on any such investment; and that the question of what, if any, investment CSX and NS plan to have Conrail make in NY/NJ Metro Area rail facilities will be critical in determining whether other parties, including the Port Authority, file “inconsistent” applications seeking to acquire Conrail assets located in the NY/NJ Metro Area.³¹

Applicants have moved to strike NYNJ-3, *see* CSX/NS-13 (filed May 16, 1997), on the ground that the NYNJ-3 pleading is not permitted by our Railroad Consolidation Procedures. *See* 49 CFR 1180.4(f)(3) (reply to a petition for waiver generally not permitted).³² Applicants have also

²⁹ Similar relief has been granted in prior cases. *See* NS/CRC No. 5, slip op. at 8; CSX/CRC No. 7, slip op. at 8; UP/SP No. 3, slip op. at 6; BN/SF No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 4.

³⁰ Similar relief has been granted in prior cases. *See* NS/CRC No. 5, slip op. at 8; CSX/CRC No. 7, slip op. at 8; UP/SP No. 3, slip op. at 6; BN/SF No. 3, slip op. at 5; UP/CNW No. 3, slip op. at 4-5.

³¹ What the Port Authority refers to as an “inconsistent” application is probably more accurately described as a “responsive” application. *See* 49 CFR 1180.3(h) (definition of responsive application), as recently amended in *Railroad Consolidation Procedures--Modification of Fee Policy*, STB Ex Parte No. 556, 62 FR 9714, 9717 (Mar. 4, 1997) and 62 FR 28375 (May 23, 1997) (*Railroad Consolidation Fees*).

³² We will deny the CSX/NS-13 motion to strike, and will accept the NYNJ-3 pleading in
(continued...)

addressed, in their CSX/NS-13 pleading, the merits of the Port Authority's argument. Applicants insist that the creation of separate Conrail *pro forma* statements would entail a complex and duplicative effort that would serve no useful purpose. And, applicants add, the creation of separate Conrail *pro forma* statements would not address the Port Authority's concerns because such statements would reflect the consolidated financial activities of Conrail, Sub A, and Sub B over the entire physical plant of Conrail, Sub A, and Sub B, not the particularized financial activities in the NY/NJ Metro Area (which, applicants note, will be but one of several areas to which both CSXT and NSR will have access).

We will grant the relief requested by applicants, by confirming that, in the balance sheets, income statements, and statements of sources and application of funds required by 49 CFR 1180.9(a), (b), and (c), respectively, applicants may reflect information respecting Conrail in the statements of CSX and NS, as appropriate. We agree that, because applicants envision that Conrail will cease to be an independent rail carrier, separate statements for Conrail on a freestanding basis would not be meaningful and would not contribute to the analysis of the Control Transaction. Applicants should be advised, however, that we expect that the primary application will fully describe the post-transaction Conrail, its structure, its management, and its operations, and, in particular, will address the concerns raised by the Port Authority (the nature of applicants' operations in the NY/NJ Metro Area, the competitive and economic effect of those operations, the investment CSX and NS anticipate making in the NY/NJ Metro Area, and the level of competition that the NY/NJ Metro Area will experience following the proposed transaction). Applicants should be further advised that we also expect that the primary application will fully explain the ultimate disposition of all of Conrail's assets and liabilities (including all revenues and expenses associated with those assets and liabilities), and will also fully explain how Conrail's debt is to be serviced.

MARKET ANALYSES AND OPERATIONAL DATA. Section 1180.7 requires impact analyses showing the anticipated effects of the proposed transaction, and Section 1180.8 requires a summary of proposed operating plan changes, based on the impact analyses. Applicants note that, if we approve and applicants effectuate the Control Transaction, CSX and NS will be, immediately following the Control Date, jointly in control of the entire, undivided Conrail. Applicants add, however, that joint control of an undivided Conrail will continue only until applicants are able to implement the Transaction Elements and thus effect the Division, and applicants insist that it would be misleading and irrelevant to present impact analyses and related information on the basis of an undivided Conrail jointly controlled by CSX and NS. Applicants therefore request, with respect to the Control Transaction, that they be allowed to submit: a separate set of impact analyses and a separate operating plan regarding each post-acquisition system (i.e., one set of analyses and plans for the post-acquisition CSX system, and another set of analyses and plans for the post-acquisition NS system); and, either as part of these separate sets or in addition thereto, appropriate information about the continuing post-Division operations of Conrail. CSX/NS-10 at 23-24. This request is reasonable, and we will therefore approve it.

INCORPORATION OF THE TRANSACTION ELEMENTS INTO THE PRIMARY APPLICATION. Applicants request, with respect to each of the Transaction Elements: that they not be required to file separate directly related applications for each such element;³³ but, rather, that they be allowed to incorporate in the primary application information

³²(...continued)
the interest of having a more complete record on this matter.

³³ See 49 CFR 1180.4(c)(2)(vi), as recently amended in *Railroad Consolidation Fees*, 62 FR at 9717: "Applicant shall file concurrently all directly related applications, *e.g.*, those seeking authority to construct or abandon rail lines, obtain terminal operations, acquire trackage rights, etc."

otherwise required to be submitted in such separate directly related applications. CSX/NS-10 at 11 and 34-36.³⁴

We agree with applicants that the Transaction Elements should not be considered in isolation. The Division is an essential feature of the Control Transaction because CSX and NS, in seeking to acquire control of Conrail, intend, for the most part, to divide it up, not to continue it in its entirety as a stand-alone entity; the Transaction Elements are simply technical descriptions of the means by which the Division will be effectuated; the transportation and competitive effects of the Transaction Elements can be evaluated only in light of the entire integrated transaction, based on the same record that we will consider in addressing the Control Transaction itself; and applicants have promised that, in seeking approval of the Control Transaction in the primary application, they will provide a full description of the entire transaction, including the Division of CRC's assets, the operation of those assets by CSX and NS, and the continuing operations of what will be a much-reduced Conrail. We agree that no useful purpose would be served by requiring applicants to file separate applications for each of the Transaction Elements, and we therefore confirm that, with the one exception noted in the next paragraph and taking into account the waivers, clarifications, and related relief provided in this decision, applicants will not be required to file, with respect to the Transaction Elements, separate directly related applications, but may, if they so choose, incorporate in the primary application information that would otherwise have been submitted in such separate directly related applications.

The one exception concerns the transfer of the Fort Wayne line from NSR to CRC. As indicated in Decision No. 4, slip op. at 6-7, and referenced above, that transfer is neither integral to nor an inseparable part of the Control Transaction,³⁵ and, for this reason, it will be considered not in the lead docket but rather in a directly related sub-docket, for which NSR and CRC must file a separate directly related application. Because the transfer of the Fort Wayne line from NSR to CRC is not, in our view, a Transaction Element, the relief granted with respect to the Transaction Elements does not apply to that transfer.³⁶

OPINION OF COUNSEL. Section 1180.6(a)(4), as recently amended in *Railroad Consolidation Fees*, 62 FR at 9717, provides that an application filed under 49 U.S.C. 11323 shall include, among other things, “[a]n opinion of applicants' counsel that the transaction meets the requirements of the law and will be legally authorized and valid, if approved by the Board. This should include specific references to any pertinent provisions of applicants' bylaws or charter or articles of incorporation.”

Applicants indicate that, with respect to the Control Transaction, they will satisfy the 49 CFR 1180.6(a)(4) opinion of counsel requirement by submitting opinions of CSX's and NS's counsel. CSX/NS-10 at 36. An opinion of Conrail's counsel will not be submitted with respect to the Control Transaction because a footnote to 49 CFR 1180.6(a)(4) provides that, in a control

³⁴ This request applies only to those interrelated aspects of the Control Transaction that applicants refer to as the Transaction Elements. For this reason, this request does not apply to directly related construction projects or directly related abandonments. CSX/NS-10 at 34 n.41.

³⁵ “The division of CRC's assets does not inherently require that anything be done with respect to a line that is not, at the present time, a CRC asset.” Decision No. 4, slip op. at 7.

³⁶ Our references to separate directly related “applications” embrace, within an expanded interpretation of the word “application,” both exemption petitions and exemption notices. The transfer of the Fort Wayne line from NSR to CRC cannot properly be subject to an exemption notice, *see* 49 CFR 1180.2(d) (this transfer does not qualify for any existing class exemption). The transfer of the Fort Wayne line, however, may or may not properly be subject to an exemption petition, *see* 49 CFR part 1121, as revised in *Expedited Procedures For Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, STB Ex Parte No. 527, 61 FR 52710, 52714 (Oct. 8, 1996) (*Expedited Procedures*).

transaction, an opinion of counsel is not required for the party sought to be controlled. 49 CFR 1180.6(a)(4) n.2.

Applicants seek waiver or clarification that, with respect to the Transaction Elements, they may satisfy the opinion of counsel requirement of 49 CFR 1180.6(a)(4) by submitting either: (i) the opinions of CSX's and NS's counsel; or (ii) the opinions of CSX's, NS's, and Conrail's counsel. CSX/NS-10 at 36-37.

We think that the better approach would be to submit: an opinion of CSX's counsel respecting the Control Transaction, the Transaction Elements, and any directly related applications, petitions, and/or notices, to the extent such transaction, elements, and directly related matters involve CSX; an opinion of NS's counsel respecting the Control Transaction, the Transaction Elements, and any directly related applications, petitions, and/or notices to the extent such transaction, elements, and directly related matters involve NS; and an opinion of Conrail's counsel respecting the Transaction Elements and any directly related applications, petitions, and/or notices, to the extent such elements and directly related matters involve Conrail. The CSX and NS opinions should be in substantially this form: "It is my opinion that the Control Transaction, including the Transaction Elements and any directly related applications, petitions, and/or notices, to the extent such transaction, elements, and directly related matters involve [CSX or NS], meet the requirements of the law, are within the corporate powers of [the various CSX or NS entities], and will be legally authorized and valid, if approved by the Surface Transportation Board." The Conrail opinion should be in substantially this form: "It is my opinion that the Transaction Elements and any directly related applications, petitions, and/or notices, to the extent such elements and directly related matters involve Conrail, meet the requirements of the law, are within the corporate powers of [the various Conrail entities], and will be legally authorized and valid, if approved by the Surface Transportation Board."

REQUIREMENTS OF PART 1150, SUBPART A. Applicants indicate that, because the rail lines to be acquired by Sub A and Sub B will be operated as integral parts of the CSX and NS systems, respectively, they intend to seek, in the primary application: (i) authorization for the Sub A/Sub B Acquisitions under 49 U.S.C. 11323; and (ii) a declaratory order that 49 U.S.C. 10901 is not applicable to the Sub A/Sub B Acquisitions. Applicants add, however, that they will include in the primary application, as a precaution, a backup request for authorization for the Sub A/Sub B Acquisitions under 49 U.S.C. 10901. CSX/NS-10 at 37.

Applicants request waiver or clarification, CSX/NS-10 at 11 (lines 10-13),³⁷ and we hereby confirm, that, subject to the exceptions referenced in the next paragraph, the informational requirements of 49 CFR part 1150, subpart A (which will govern the backup request for authorization under 49 U.S.C. 10901) will be satisfied if, and to the extent that, the informational requirements of 49 CFR part 1180, subpart A (which will govern the request for authorization under 49 U.S.C. 11323) are satisfied.

As applicants note, however, a few provisions of 49 CFR part 1150, subpart A impose informational requirements that have no precise analogues in 49 CFR part 1180, subpart A. With respect to these few provisions, and also with respect to the otherwise applicable procedural requirements of 49 CFR part 1150, subpart A, applicants seek waiver or clarification as indicated in the next eight paragraphs.

1. Section 1150.3(d) requires applicants to submit a statement indicating any affiliation by stock ownership or otherwise with any industry to be served by the acquired rail line; and section 1150.3(e) requires applicants to submit information regarding the date and place of organization of applicants, applicable State statutes, and a brief description of the nature and objectives of applicants. Applicants, noting that they need not submit this information in the primary application in connection with the Control Transaction, request waiver or clarification that this information is not required for the Board's evaluation of the Sub A/Sub B Acquisitions. CSX/NS-10 at 38. The

³⁷ See also CSX/NS-10, Appendix B (referenced at CSX/NS-10 at 38).

request is reasonable (we agree that this information is not required in this context), and we will therefore approve it.

2. Section 1150.3(f)(2) requires applicants to submit, as an exhibit, any resolution of the stockholders or directors authorizing the proposal. Applicants, noting that they need not submit this information in the primary application in connection with the Control Transaction, indicate that they will submit: opinions of counsel, as required by 49 CFR 1180.6(a)(4); copies of the acquisition agreements, as required by 49 CFR 1180.6(a)(7)(ii); and, subject to the waivers granted in this decision, various financial filings, as required by 49 CFR 1180.6(b)(1), (2), and (4). Applicants seek waiver or clarification that this information will be sufficient to satisfy the requirements of 49 CFR 1150.3(f)(2). CSX/NS-10 at 38-39. We agree that this information will be sufficient for this purpose, and we will therefore grant the requested waiver or clarification.

3. Section 1150.4(e) requires applicants to submit, among other things, a list of the counties and cities to be served under the proposal. Applicants indicate that they will provide a list in the primary application in connection with the Control Transaction, as required by 49 CFR 1180.6(a)(5), of the States (but not the counties and cities) in which the applicant carriers' property is located. Applicants contend that, given the size of the networks that CSX, NS, and Conrail operate, compilation of a list of counties and cities would be burdensome to the applicants and of little value to the Board. Applicants accordingly seek waiver or clarification that they may satisfy this requirement of 49 CFR 1150.4(e) through information responsive to 49 CFR 1180.6(a)(5). CSX/NS-10 at 39. This request is reasonable, and we will therefore approve it.

4. Section 1150.6(c) requires a present value determination of the full costs of the proposal. Applicants, noting that they need not submit this information in the primary application in connection with the Control Transaction, indicate that they will submit a variety of financial information that will permit the Board to evaluate the financial impact of the Sub A/Sub B Acquisitions on applicants, including the information required by 49 CFR 1180.6(a)(1)(i), (a)(1)(iv), (a)(2)(ii), and (a)(7)(i), as well as the information required by 49 CFR 1180.9. Applicants request waiver or clarification that this information will be sufficient to satisfy the requirements of 49 CFR 1150.6(c). CSX/NS-10 at 39. This request is reasonable, and we will therefore approve it.

5. Section 1150.9 requires a summary of the proposed transaction which will be used to provide the notice required by 49 CFR 1150.10(f). Applicants note: that they need not submit this summary in the primary application in connection with the Control Transaction; that, as required by 49 CFR 1180.6(a)(1), they will include, in the primary application, a description of the entire transaction proposed in the primary application; and that (as noted below) they are also requesting a waiver of 49 CFR 1150.10(f). Applicants therefore seek clarification that the information provided pursuant to 49 CFR 1180.6(a)(1) will satisfy 49 CFR 1150.9. CSX/NS-10 at 39-40. The clarification sought by applicants is reasonable, and we will therefore approve it.

6. Section 1150.10(e) requires: (i) service of the application upon the Governor (or Executive Officer), Public Service Commission, and Department of Transportation of each State in which any part of the involved properties are located; and (ii) within 2 weeks of the filing of the application, submission to the Board of a certificate of service indicating that all persons so designated have been served a copy of the application. Applicants seek waiver or clarification, CSX/NS-10 at 40, and we hereby confirm, that compliance with the service requirements of 49 CFR part 1180, subpart A, will constitute compliance with 49 CFR 1150.10(e). *See* 49 CFR 1180.4(c)(5)(i) (similar service requirement, but no explicit certification requirement).

7. Section 1150.10(f) provides: (i) that, within 2 weeks of filing an application, applicants must publish a summary thereof in a newspaper of general circulation in each county in which the lines to be affected by the transaction are located; and (ii) that the Board will, as soon as practicable, either publish the summary in the *Federal Register* or reject the application if it is incomplete. Applicants, noting that the proposed transaction has received extensive media coverage both in trade journals and newspapers of general circulation throughout the country, and noting also that Decision No. 2 constituted *Federal Register* publication of their CSX/NS-1 notice of intent, seek waiver or

clarification that compliance with 49 CFR 1150.10(f) is not necessary. CSX/NS-10 at 40. The waiver or clarification sought by applicants is reasonable, and we will therefore approve it.

8. Sections 1150.10(g) and (h) provide a procedure for the processing of an application filed under 49 CFR part 1150, subpart A. Applicants request that compliance with this procedure be waived and that we evaluate the Sub A/Sub B Acquisitions under the procedural schedule adopted in connection with the primary application. CSX/NS-10 at 40-41. This request is reasonable, and we will therefore approve it.

REVOCATION OF CERTAIN CLASS EXEMPTIONS. Applicants intend to seek authorization under 49 U.S.C. 11323 for the Transaction Elements referred to as the Sub A/Sub B Acquisitions, the Continuance in Control, the Operating Arrangements, and the CSX/NS Trackage Rights; and, with respect to the Sub A/Sub B Acquisitions, applicants also intend to seek backup authorization under 49 U.S.C. 10901. Applicants note: that, with respect to the Sub A/Sub B Acquisitions, the Continuance in Control, and the Operating Arrangements, the 49 CFR 1180.2(d)(3) corporate family class exemption may be applicable; that, with respect to the CSX/NS Trackage Rights, the 49 CFR 1180.2(d)(7) trackage rights class exemption may be applicable; and that, with respect to the backup authorization of the Sub A/Sub B Acquisitions under 49 U.S.C. 10901, the 49 CFR 1150.31-35 noncarrier acquisition class exemption may be applicable. Applicants, however, would rather not seek authorization by exemption; applicants would prefer instead to seek authorization by approval. Applicants therefore request, with respect to the Sub A/Sub B Acquisitions, the Continuance in Control, the Operating Arrangements, and the CSX/NS Trackage Rights, and apparently also with respect to the Control Transaction, revocation of the 49 CFR 1180.2(d)(3), 1180.2(d)(7), and 1150.31-35 class exemptions. CSX/NS-10 at 11-12 and 41-42.

Applicants' revocation request is intended to eliminate any question respecting the coverage of the 49 U.S.C. 11321(a) immunity provision. This Board and its predecessor (the Interstate Commerce Commission) have "consistently taken the position that [the immunity provision] applies to authorizations by exemption [under what is now 49 U.S.C. 10502] as well as to approvals." *Delaware and Hudson Railway Co.--Lease and Trackage Rights--Springfield Terminal Ry. Company*, Finance Docket No. 30965 (Sub-Nos. 1 and 2) (ICC served Apr. 21, 1993) (slip op. at 2 n.4).³⁸ As applicants note, however, there is some authority to the contrary. *See Railway Labor Executives' Ass'n v. U.S.*, 987 F.2d 806, 813 (D.C. Cir. 1993).

The class exemption procedures were adopted in order to ease regulatory burdens. We realize, however, that, in certain instances, parties may find it easier or more desirable to seek authorization by approval rather than by exemption, and we see no reason to require applicants in the present proceeding to seek authorization by exemption. Under 49 U.S.C. 10502(d), we may revoke an exemption when we find that application in whole or in part of a provision of Title 49, Subtitle IV, Part A (49 U.S.C. 10101-11908) is necessary to carry out the transportation policy of 49 U.S.C. 10101. In prior cases, class exemptions have been revoked in similar circumstances. *See Rio Grande Industries, Inc., et al.--Purchase and Trackage Rights--Chicago, Missouri & Western Railway Company Between St. Louis, MO and Chicago, IL*, Finance Docket No. 31522, Waiver Decision (ICC served Aug. 18, 1989) (*RGI/CM&W Waiver*, slip op. at 4-5); *Rio Grande Industries, Inc., et al.--Purchase and Related Trackage Rights--Soo Line Railroad Company Line Between Kansas City, MO and Chicago, IL*, Finance Docket No. 31505, Decision No. 3

³⁸ *See also Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (*UP/SP No. 44*, slip op. at 173 n.221); *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control--Chicago and North Western Transportation Company and Chicago and North Western Railway Company*, Finance Docket No. 32133, Decision No. 25 (ICC served Mar. 7, 1995) (*UP/CNW No. 25*, slip op. at 63-64).

(ICC served Aug. 16, 1989) (*RGI/Soo No. 3*, slip op. at 4-5). Adhering to these prior cases, and recognizing that authorization by approval would eliminate any dispute respecting the applicability of the immunity provision to an authorization by exemption, we find that permitting applicants to seek authorization by approval here is necessary to carry out the transportation policy of 49 U.S.C. 10101. Accordingly, we will revoke the 49 CFR 1180.2(d)(3), 1180.2(d)(7), and 1150.31-35 class exemptions with respect to the Control Transaction and the Transaction Elements referred to as the Sub A/Sub B Acquisitions, the Continuance in Control, the Operating Arrangements, and the CSX/NS Trackage Rights, and we will allow applicants to seek authorization by approval as opposed to authorization by exemption.³⁹

APPLICABLE FEES. Applicants request waiver or clarification regarding the fees they must pay when they file the primary application and any directly related applications, petitions, and/or notices. CSX/NS-10 at 42-44.

The user fees we charge are intended to make the services of the Board self-sustaining to the maximum extent possible, *Railroad Consolidation Fees*, 62 FR at 9714. We think that, with the one exception indicated in the next paragraph, the approach advocated by applicants is correct. Applicants recognize that the primary application constitutes, for fee purposes, two primary applications, one by CSX and one by NS, and applicants therefore indicate that they do not object to paying two “major transaction” fees.⁴⁰ Applicants also indicate that they are prepared to pay any additional fees required for directly related construction projects and directly related abandonments, and also any additional fees required with respect to incidental control of third-party carriers (although applicants indicate that the LD&RT is the only third-party carrier that applicants will seek authorization to control). Applicants argue, however, and (with the one exception indicated in the next paragraph) we agree, that they should not be required to pay any additional fees with respect to the Transaction Elements. We therefore confirm that, with the one exception indicated in the next paragraph, the two “major transaction” fees to be paid by CSX and NS will cover the Control Transaction and all of the Transaction Elements.

The one exception relates to the transfer of the Fort Wayne line from NSR to CRC. As previously noted, we do not regard this transfer as a Transaction Element. Applicants will therefore be required to seek authorization for this transfer in a separate directly related sub-docket, and will be required to pay a separate fee with respect thereto.

DIRECTLY RELATED CONSTRUCTION PROJECTS. Applicants may have certain directly related construction projects for which they seek approval or exemption in applications, petitions, and/or notices submitted with the primary application.⁴¹ These construction projects would ordinarily be subject to the prefiling notice requirements of section 1150.1(b), section 1105.10(a), and/or section 1150.36(c)(1). Section 1150.1(b) requires consultation with the Board's Section of Environmental Analysis (SEA) at least 6 months prior to the filing of a 49 U.S.C. 10901 construction application; section 1105.10(a) requires submission of a written notice to SEA at least

³⁹ We realize that the 49 U.S.C. 11321(a) rationale that applicants have advanced and we have adopted is not applicable to the backup authorization of the Sub A/Sub B Acquisitions under 49 U.S.C. 10901. The 49 U.S.C. 11321(a) immunity provision cannot possibly apply to an authorization under 49 U.S.C. 10901, even if such authorization is by approval. Nevertheless, if applicants would prefer to seek backup authorization under 49 U.S.C. 10901 by approval, we see no reason to require them to seek such backup authorization by exemption.

⁴⁰ See 49 CFR 1002.2(f)(38)(i), (39)(i), (40)(i), and (41)(i), as amended in *Regulations Governing Fees For Services Performed in Connection With Licensing and Related Services--1997 Update*, STB Ex Parte No. 542 (Sub-No. 1), 62 FR 3487, 3488-89 (Jan. 23, 1997), and further amended in *Railroad Consolidation Fees*, 62 FR at 9715-16.

⁴¹ If we ultimately deny the CSX-1 and NS-1 waiver petitions discussed in Decision No. 5, the directly related construction projects to be submitted with the primary application would include the 7 projects referenced in the CSX-1 and NS-1 petitions.

6 months prior to the filing of a construction application if the proposed construction might require preparation of an environmental impact statement (EIS); and section 1150.36(c)(1) requires notification to various state agencies at least 20 days prior to filing a notice of exemption with the Board with respect to the construction of connections on existing rail rights-of-way or on land owned by the connecting railroads.⁴²

Applicants indicate: that they have begun the process of consulting with SEA with regard to the primary application and all related applications, petitions, and notices; that they intend to furnish a Preliminary Environmental Report (PER) advising SEA of all specific directly related construction projects no later than 30 days prior to the filing of the primary application;⁴³ and that they will provide SEA with such other reasonably available information as may be required regarding those projects. Applicants add that they will file their detailed environmental report with the primary application. *See* 49 CFR 1180.6(a)(8) (requirement that applicants submit information and data with respect to environmental matters in accordance with 49 CFR part 1105). Applicants therefore request that we waive or clarify the prefiling notice requirements of 49 CFR 1150.1(b) and 49 CFR 1105.10(a), and find that notice to SEA of directly related construction projects will be satisfactory if provided no later than 30 days prior to the filing of the primary application. Applicants also request that we waive the 49 CFR 1150.36(c)(1) prefiling notification requirement, and allow them to serve the notice required by 49 CFR 1150.36(c)(1) no later than the date on which they file with the Board any verified notices of exemption that may accompany the primary application. Applicants further request that we waive the 49 CFR 1150.36(c)(2) requirement that any verified notices of exemption filed with the Board certify compliance with the prefiling notice requirements of 49 CFR 1150.36(c)(1). CSX/NS-10 at 24-26.

In view of applicants' previous consultations with SEA and in light of the submission, in the PER, of detailed descriptive information, and on the condition that the consultations with SEA continue, waiver of the 6-month time periods required in both 49 CFR 1150.1(b) and 49 CFR 1105.10(a), waiver of the 20-day time period required in 49 CFR 1150.36(c)(1), and waiver of the 49 CFR 1150.36(c)(2) certification requirement, will be granted as requested by applicants.⁴⁴

As indicated in Decision No. 6, SEA has determined, and we have agreed, that the preparation of an EIS is warranted for this proceeding. This determination is based on the nature and scope of the environmental issues (e.g., issues respecting intercity passenger service and

⁴² Sections 1150.1(b) and 1105.10(a) refer to “applications” and “applicants,” but the prefiling notice requirements also apply to construction projects for which exemption is sought either by petition or by notice. *See* 49 CFR 1105.4(b) (for the purposes of the 49 CFR part 1105 environmental regulations, “applicant” means any person or entity seeking Board action, whether by application, petition, or notice). *See also* 49 CFR 1121.3(b), as revised in *Expedited Procedures*, 61 FR at 52714 (a 49 U.S.C. 10502 exemption petition must comply with the 49 CFR part 1105 environmental regulations). *See also* 49 CFR 1150.36(a) (a 49 CFR 1150.36 exemption notice must comply with the 49 CFR part 1105 environmental regulations).

⁴³ Applicants submitted their PER on May 16, 1997.

⁴⁴ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 9-10; *CSX/CRC No. 7*, slip op. at 9-10; *UP/SP No. 3*, slip op. at 7; *BN/SF No. 3*, slip op. at 6-7. The relief granted here includes, but is not limited to, the seven construction projects referenced in the CSX-1 and NS-1 waiver petitions. If we ultimately approve the waivers sought in the CSX-1 and NS-1 petitions, the relief granted here will apply, as regards the seven projects referenced therein, as follows: with respect to 49 CFR 1150.1(b) and 49 CFR 1105.10(a), notice to SEA of the seven projects will be satisfactory if provided no later than 30 days prior to the filing of the primary application; with respect to 49 CFR 1150.36(c)(1), the notice required by that provision must be provided no later than the date on which applicants file with the Board any 49 CFR 1150.36(c)(2) exemption notices; and, with respect to 49 CFR 1150.36(c)(2), applicants need not certify compliance with the prefiling notice requirements of 49 CFR 1150.36(c)(1).

commuter rail service) that are likely to arise in this proceeding in connection with the Control Transaction and the Transaction Elements, but not necessarily in connection with the directly related construction projects. If we ultimately approve the waivers sought in the CSX-1 and NS-1 petitions, we will determine, either in the decision approving the waivers or at some time thereafter, the appropriate level of environmental review for the proposed physical construction of the seven projects referenced in those petitions. If we do not approve the waivers sought in the CSX-1 and NS-1 petitions, the physical construction of the seven projects referenced in those petitions will be considered as part of the EIS that will be prepared in the overall proceeding. Whether or not the waivers sought in the CSX-1 and NS-1 petitions are granted, all questions respecting operation by CSXT or NSR (or their affiliates) over the seven projects referenced in those petitions will be addressed in the EIS for the overall proceeding.

DIRECTLY RELATED ABANDONMENTS. Applicants request that they be allowed to file any directly related abandonment applications, petitions, and notices together with the primary application, and that all directly related abandonments be processed on the same schedule as the Control Transaction. Applicants further request, pursuant to 49 CFR 1152.24(e)(5), the waiver or clarification of certain information requirements applicable to abandonment applications.⁴⁵

Waiver of 49 CFR 1152.13(c) System Diagram Map Requirement. Applicants indicate that they will not be able to identify lines for which directly related abandonment authority will be sought until the process of preparing the primary application is nearer to completion. Applicants add that, for this reason, it will not be possible, if abandonment applications are to be filed with the primary application, to comply with the requirement in 49 CFR 1152.13(c), 61 FR at 67885, that a line for which abandonment approval is sought be identified in category 1 on the abandoning railroad's system diagram map for at least 60 days prior to the filing of the abandonment application. Applicants therefore request that the 60-day notice requirement of 49 CFR 1152.13(c) be waived, and that applicants be permitted to file directly related abandonment applications simultaneously with the primary application without first including the segments proposed for abandonment in category 1 of the appropriate system diagram map. CSX/NS-10 at 26-27.

We find applicants' request reasonable, and we will therefore grant the requested waiver of the 60-day notice requirement of 49 CFR 1152.13(c).⁴⁶ Because all directly related abandonments will be processed on the same schedule as the Control Transaction, the planning needs of shippers and state and local governments affected by the proposed abandonments will be adequately met even if these parties first learn of the proposed abandonments when the primary application is filed. The procedural schedule established in Decision No. 6 provides that parties opposing any proposed directly related abandonments will have adequate time to prepare their opposition submissions.⁴⁷

Waiver of 49 CFR 1105.7(b) Environmental Report Requirement and 49 CFR 1105.8(c) Historic Report Requirement. A railroad seeking to abandon a line is required to serve copies of an Environmental Report upon certain agencies, as well as a Historic Report upon the appropriate State Historic Preservation Officer, at least 20 days prior to the filing of an application,

⁴⁵ All references herein to our 49 CFR part 1152 abandonment regulations are to our new regulations, which took effect on January 23, 1997. *See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, STB Ex Parte No. 537, 61 FR 67876 (Dec. 24, 1996). Any relief granted for directly related abandonments proposed by applicants will be equally applicable to any directly related discontinuances proposed by applicants. *See* 49 CFR 1152.1(b), 61 FR at 67883 (the 49 CFR part 1152 regulations govern both abandonment of, and discontinuance of service over, rail lines).

⁴⁶ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 10-11; *CSX/CRC No. 7*, slip op. at 10-11.

⁴⁷ We expect that, no later than the date of filing of the primary application, applicants will include, in the appropriate system diagram map or maps, all of the lines subject to directly related abandonment applications.

a petition, or a notice. *See* 49 CFR 1105.7(b) and 1105.8(c), 61 FR at 67883 (revising the Part 1105 environmental regulations to conform to the new Part 1152 abandonment regulations). *See also* 49 CFR 1152.20(c), 61 FR at 67885 (referencing, in the application context, the requirement respecting the Environmental Report and the Historic Report). Applicants request that these advance filing requirements be waived, and that applicants be permitted: (i) to notify SEA of the proposed abandonments in the Preliminary Environmental Report filed 30 days prior to the filing of the primary application; and (ii) to file the full Environmental Report, which will include, among other things, the information required in the Historic Report, concurrently with the primary application. CSX/NS-10 at 27-28.

We find applicants' request reasonable, and we will therefore grant the requested waiver of the advance filing requirements of 49 CFR 1105.7(b) and 1105.8(c). A decision on any directly related abandonments proposed by applicants will not be issued until approximately 350 days after the date of filing of the primary application. *See* Decision No. 6. Interested parties will therefore have ample time, and more time than would normally be available in a freestanding abandonment setting, to review any proposed directly related abandonments and to participate in the environmental process prior to the time a decision authorizing any abandonment is ever issued.⁴⁸

Procedural Schedule Applicable to Abandonments. Applicants request that proceedings arising out of directly related abandonments be exempted, pursuant to 49 U.S.C. 10502, from the offer of financial assistance (OFA) procedural requirements of 49 U.S.C. 10904(b)-(f). CSX/NS-10 at 28-30. We are unable to discern, however, precisely what procedural schedule applicants would prefer. Applicants indicate, *see* CSX/NS-10 at 28-29, that they would like a procedural schedule similar to those adopted in *NS/CRC No. 5*, slip op. at 12, and *CSX/CRC No. 7*, slip op. at 12; but applicants also indicate, *see* CSX/NS-10 at 30, that they would like a procedural schedule under which consideration of OFAs would be deferred until after: (i) the Board has made a determination on the primary application; and (ii) applicants have determined to effect the Control Transaction. The two procedural schedules that applicants have in mind are not entirely compatible.

The procedural schedules established by the 49 CFR part 1152 abandonment regulations must, of necessity, be conformed to the overall procedural schedule applicable to the Control Transaction, and we therefore agree with applicants that we should process any directly related abandonment applications in accordance with the overall procedural schedule, rather than applying the procedures found at 49 U.S.C. 10904. We will therefore grant a 49 U.S.C. 10502 exemption from the procedural requirements of 49 U.S.C. 10904. We find that application of 49 U.S.C. 10904 is not necessary here to carry out the transportation policy of 49 U.S.C. 10101, and that the procedures we are modifying are of limited scope here within the meaning of 49 U.S.C. 10502.

The procedural schedule established in Decision No. 6 provides that all directly related abandonment proposals (which may be filed as applications, petitions, and/or notices): are to be filed, with any and all supporting documentation, simultaneously with the primary application; and will be processed on the same schedule as the Control Transaction. The procedural schedule established in Decision No. 6 further provides that, if the primary application is complete, we shall publish in the *Federal Register*, by the 30th day after the date of filing of the primary application, notice of the acceptance of that application, *see* 49 U.S.C. 11325(a), and also notice of any directly related abandonment proposals. Thereafter, with respect to each directly related abandonment proposal: (1) interested parties must file, by the 45th day after the date of filing of the primary application, notifications of intent to participate in the specific abandonment proceedings; (2) interested parties must file, by the 120th day after the date of filing of the primary application,

⁴⁸ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 11; *CSX/CRC No. 7*, slip op. at 11.

opposition submissions, requests for public use conditions,⁴⁹ and/or Trails Act requests;⁵⁰ (3) applicants may file, by the 175th day after the date of filing of the primary application, rebuttal in support of their abandonment proposals, and/or responses to any requests for public use conditions and Trails Act requests; (4) as with the primary application and all related matters, briefs will be due by the 245th day after the date of filing of the primary application, oral argument will be held on the 290th day after the date of filing of the primary application, and a voting conference will be held, at the Board's discretion, on the 295th day after the date of filing of the primary application; and (5) if, in the final decision served on the 350th day after the date of filing of the primary application, we approve the primary application, we shall also address, in that final decision, each of the abandonment proposals, and all matters (including requests for public use conditions and Trails Act requests) relative thereto; and if we either approve or exempt any of the abandonment proposals, we shall require interested persons to file, no later than 10 days after the date of service of the final decision, OFAs⁵¹ with respect to any of the approved or exempted abandonments.⁵²

Information Requirements Applicable to Abandonment Applications. Applicants request the waiver or clarification of certain of the information requirements made applicable to abandonment applications by 49 CFR 1152.22, 61 FR at 67886-88.

1. Section 1152.22(c)(8), 61 FR at 67887, requires information on any important changes in train service during the 2 calendar years immediately preceding the filing of the abandonment application. Applicants note, however, that much of the trackage that could be the subject of their abandonment applications is trackage being used primarily for overhead operations, and applicants claim that, on this trackage, numerous changes in overhead train service undoubtedly occurred without any relation to local traffic. Applicants contend that 49 CFR 1152.22(c)(8) would impose a substantial burden on applicants to accumulate data that would be of little or no value to the Board in evaluating the merits of a directly related abandonment application. Applicants therefore request that we limit 49 CFR 1152.22(c)(8) to important changes in local train service. CSX/NS-10 at 31. This request is reasonable, and we will therefore approve it.⁵³

2. Section 1152.22(d), 61 FR at 67887, requires detailed revenue and cost data relating to the line to be abandoned. Applicants request that, where the combined CSX/Conrail or NS/Conrail systems will retain overhead traffic, we grant a waiver permitting: (i) the exclusion of data on revenues and costs associated with overhead traffic; and (ii) the preparation of cost data on a *pro forma* basis reflecting the exclusion of overhead traffic. Applicants argue that the submission of financial data respecting overhead traffic that will be retained either by the combined CSX/Conrail system or by the combined NS/Conrail system would impose a burden on applicants and would not serve any useful purpose. CSX/NS-10 at 31-32. The requested waiver is reasonable (because data respecting overhead traffic that will be retained on other mainline tracks is not germane to an abandonment application), and we will therefore approve it.⁵⁴

3. Section 1152.22(d), 61 FR at 67887, also requires that abandonment applications include information about costs attributable to traffic on the line to be abandoned for a Base Year

⁴⁹ See 49 CFR 1152.28 (61 FR at 67894).

⁵⁰ See 49 CFR 1152.29 (61 FR at 67894-96).

⁵¹ See 49 CFR 1152.27 (61 FR at 67891-94).

⁵² Similar procedural schedules have been adopted in prior cases. See *NS/CRC No. 5*, slip op. at 11-12; *CSX/CRC No. 7*, slip op. at 11-12.

⁵³ Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 13; *CSX/CRC No. 7*, slip op. at 13; *UP/SP No. 3*, slip op. at 11.

⁵⁴ Similar relief has been granted in prior cases. See *NS/CRC No. 5*, slip op. at 13; *CSX/CRC No. 7*, slip op. at 13; *UP/SP No. 3*, slip op. at 11-12.

and a Forecast Year. The Base Year is the latest 12-month period, ending no earlier than 6 months prior to the filing of the abandonment application, for which data have been collected at the branch level. *See* 49 CFR 1152.2(c), 61 FR at 67883. The Forecast Year is the 12-month period, beginning with the first day of the month in which the application is filed with the Board, for which future revenues and costs are estimated. *See* 49 CFR 1152.2(h), 61 FR at 67883. Applicants contend that, in the case of abandonments related to a major combination that will result in a substantial alteration in operations on the affected lines, “historic data” (i.e., Base Year data) are particularly misleading. Applicants therefore request that the requirements of 49 CFR 1152.22(d) concerning revenue and cost data for a Base Year be waived, and that applicants be authorized to present revenue and cost data for the Forecast Year only. CSX/NS-10 at 33. The requested waiver, in our opinion, is not reasonable, and we will therefore deny it. Compilation of Base Year data is necessary for comparison purposes; without Base Year data, there would be nothing against which Forecast Year data could be compared.⁵⁵

4. Applicants also request clarification (or, if necessary, a waiver to the effect) that any abandonment applications may report costs on a *pro forma* consolidated post-acquisition basis, using the same consolidated cost data that are to be used in the operating plan and in other parts of the primary application. Applicants contend that the purpose of the cost data in a directly related abandonment application is to permit an assessment of the cost of handling the traffic that will remain on the line after the Control Transaction and a determination whether handling that traffic will constitute a burden on the carrier. Applicants maintain that, for this purpose, the relevant cost data are those of the combined systems (i.e., the CSX/Conrail system and the NS/Conrail system), and that it thus makes sense for the Forecast Year in the application to be based on the consolidated cost data of the appropriate combined system. Applicants add that, if Base Year data are required, it likewise makes sense to use the same consolidated cost data for the Base Year so that interested persons can make comparisons on a common basis between the Base Year and the Forecast Year. Applicants also note that use of the same consolidated data for the abandonment applications as will be used in the primary application will simplify the process of preparing the abandonment applications. CSX/NS-10 at 32-33. The requested waiver is reasonable (because the information applicants propose to submit will be sufficient for our purposes), and we will therefore approve it.⁵⁶

OPERATING TIMETABLES. We request that applicants submit, with the primary application, 10 copies of each of their operating timetables. This information will facilitate our analysis of a number of aspects relating to this proceeding.⁵⁷

SUPPLEMENTATION OF THE PRIMARY APPLICATION. We appreciate the difficulties applicants may face in coordinating, and avoiding duplications in, estimates of changes in key factors such as traffic flows. We understand that these difficulties are quite real, but we will nevertheless insist on having, in the record, information and data that will allow us to make accurate projections respecting both the benefits of the Control Transaction as a whole and the competitive,

⁵⁵ Similar waivers were requested, and denied, in prior cases. *See NS/CRC No. 5*, slip op. at 13; *CSX/CRC No. 7*, slip op. at 13. Applicants, urging “reconsideration” of such prior denials, *see* CSX/NS-10 at 33, contend, with respect to each line for which an abandonment application will be filed: that the revenues and costs associated with the overhead traffic that will be rerouted if a line is abandoned will be reflected in the revenue and cost projections set forth in the primary application; and that the revenues and costs associated with the local traffic that will remain if the line is not abandoned will be reflected in the Forecast Year projections in the abandonment application. Applicants, however, have not addressed our main concern respecting the requested waiver: that without Base Year data, there will be nothing against which Forecast Year data can be compared.

⁵⁶ Similar relief has been granted in prior cases. *See NS/CRC No. 5*, slip op. at 13-14; *CSX/CRC No. 7*, slip op. at 13-14; *UP/SP No. 3*, slip op. at 12. We expect, of course, that applicants will fully explain and justify their consolidated, post-acquisition cost calculations.

⁵⁷ Similar requests have been made in prior cases. *See NS/CRC No. 5*, slip op. at 14; *CSX/CRC No. 7*, slip op. at 14.

environmental, financial, and labor impacts thereof. Applicants are therefore advised that, if necessary, they may be required to supplement or clarify information and data contained in the primary application.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The CSX/NS-13 motion to strike is denied.
2. ARU's request for leave to file the ARU-4 pleading is granted, and the CSX/NS-14 motion to strike is denied.
3. The CSX/NS-10 petition for waiver or clarification, and related relief, is granted to the extent set forth in this decision.
4. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

APPENDIX A

CLASSIFICATION OF JOBS SHOWN IN
LABOR IMPACT DATA, 49 CFR 1180.6(a)(2)(v)

Blacksmiths

Boilermakers

Bridge Inspectors

Carmen

Clerical Employees

Communication Workers

Dock Workers

Electricians

Engineers

Fireman and Oilers

Foremen

Laborers

Machinists

Maintenance of Way

Nonagreement

Police

Railway Supervisors

Sheet Metal Workers

Signalmen

Train Dispatchers

Trainmen

Yardmasters

APPENDIX B

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES
49 CFR 1180.6(a)(2)(v)

(Applicant Carrier)

Current Location	Classification	Jobs Transferred to	Jobs Abolished	Jobs Created	Year
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